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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

HARVEY B. McALLISTER, *Petitioner*,

v.

CITY OF MOODY, TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioner seeks review of a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, (R. 67), affirming order of dismissal (R. 59-60) of the District Court of the United States for the Western District of Texas, Waco Division, sustaining motion of respondent to dismiss (R. 58-9).

Petitioner, plaintiff in the trial court, sued respondent (first amended original petition, R. 56-7) for $22,200.00, which petitioner alleged he would have made, under his contracts with respondent, as engineering fees, in connection with the building of a water works, sanitary sewer, light and power plant, and ice and cold storage system, for and to be municipally owned by respondent, had he been permitted by it to carry out his contracts. The contracts were alleged to have been of date June 9, 1936 (R. 56) "under the terms of which defendant agreed, bound and obligated itself to pay to plaintiff certain engineering fees in connection with" said construction, which systems were "to be owned by said city." Attached and made part of the amended petition, as Exhibit A (R. 29-35), is the original contract; petitioner alleging additional contract "in the form of a

city council resolution" in possession of respondent, which was notified to produce same (R. 56-7). It is alleged (R. 57):

> "that thereafter, the Defendant, City of Moody, breached and attempted to repudiate said contracts, that said Plaintiff learned of such breach on or after the 20th day of February, 1938, that at all times from the executions of said contracts up to the present time, Plaintiff has been ready, willing and able to perform the services therein set forth, but has been prevented by the action of the Defendant; that had Plaintiff been permitted to continue under the terms of the aforesaid contracts, he would have been entitled to receive therefor the sum of $22,200.00."

Prayer was for such sum, with interest, costs and for general relief.

Exhibit A (R. 29) evidences employment of petitioner by respondent, being an engineering contract, dated June 9, 1936, employing petitioner as consulting engineer "to furnish plans, specifications and to superintend the construction of the above utilities for owner," and, (R. 34), petitioner's acceptance, reciting that petitioner will "get busy and aid the city * * * in the building of the above Water Works, Sewer System, Light and Power Plant, and other facilities that City of Moody desires to build at this time * * * requests full cooperation * * * in fulfilling the above contract" (R. 34-5). The contract recites that petitioner is to receive six per cent of costs of the projects, and in subparagraphs (1) to (10), inclusive (R. 30), recites the engineer's services consist of:

"valuation surveys, maps, reports, conferences, etc., to enable the city to purchase and get rid of competition of existing small utilities, if desired; the necessary conferences, the preparation of preliminary studies, working, drawings, specifications, large scale or full sized drawings, as occasions necessitate, the drafting of the forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and the supervision of the work during promotion and construction of the above named utilities and work."

The contract provides how payments shall be made to petitioner, for his supervision, for preliminary estimates, as required, the meaning of the cost of the work, the ownership of documents, the number of sets of plans to be furnished, against assignment of the contract, for compliance with the rules of the PWA or such concern that contributes cash by loans or grant, that owner shall fill out and file all needed papers for loan or grant, or both, or make necessary application for private funds, and press all applications to secure funds needed, and that owner's failure or refusal to apply for or diligently press such applications shall be a breach, and that both owner and engineer agree to full performance and to do all in their power to secure needed construction funds, and to build the utilities.

Suit was filed February 15, 1943 (R. 44).

Respondent filed motion November 1, 1943 (R. 58-9) to dismiss because contract sued on:

"1 * * * is unenforceable because it attempts to bind the city for contingent acts performable in the future for which there was then existent no authority of law.

"2 * * * is conditional only, and the City within its governmental powers had authority to refuse to perform.

"3 * * * attempts to bind the City to expend the money over a long and indefinite period and for more than one year without first having levied a tax to pay same.

"4 * * * attempts to bind the City to pay out money at a time when there were no funds available for such purpose, and such contract is opposed to the public policy of this State.

"5. Said petition does not conform to the rules of civil procedure applicable to this Court in that it is not a brief and terse statement of Plaintiff's Cause of Action, but same is a running narrative wherein inflammatory and irrelevant allegations are so intermingled with allegations of fact as to make said petition unintelligible and it is impossible to determine therefrom Plaintiff's precise claim.

"6. This suit on its face is barred by the four year statute of limitation in that it appears therefrom that the City had breached its contract more than four years prior to the filing of this suit.

"7. For the reason that it affirmatively appears from the petition in Paragraphs 22, 22a, 22b, 22c, 22d and 23 that plaintiff himself failed to perform and failed to furnish the financing as stipulated in the contract."

Grounds 5 and 7, dealing with form and averments of the original petition, are inapplicable because, pending the motion to dismiss, the amended petition was filed November 23, 1943 (R. 57).

The motion was granted, and cause dismissed, by order of March 6, 1944 (R. 59-60).

The case having gone off on motion to dismiss, the facts appear exclusively, of course, in the petition, and attached exhibits made part thereof.

This is a companion case to that of *Harvey B. McAllister, Petitioner*, v. *City of Riesel, Texas, Respondent*, in which petition for writ of certiorari is filed on the same date as in this cause. That is to say, the facts, such as the contracts and dates thereof, and dates of breach and of filing petitions, differ in the two cases; but the legal questions are identical, —identical motion in the Riesel case was filed, and identical order of dismissal entered in the two cases. The two causes were submitted at the same time in the Circuit Court of Appeals, and decided on the same date. In the instant case, memorandum opinion was written, affirming the order of dismissal "upon the same grounds as stated in *McAllister* v. *City of Riesel*, decided this date" (R. 66). The opinion in the City of Riesel case referred to is reported in 146 Fed. (2) 130. The grounds of affirmance as there stated were:

(a) That the contract was so vague and indefinite as not to be enforcible (a ground not

asserted in the trial court), and that right to compensation was contingent under the contract.

(b) That the amended petition was insufficient in that:

(1) It does not allege performance of the conditions precedent to petitioner's right to recover;

(2) That the performance was wrongfully prevented by the City; nor

(3) That the period from September 2, 1935, until July 15, 1938, was not a reasonable time within which to perform the conditions precedent; nor

(4) Was performance of the conditions precedent alleged or excused.

II.

BASIS OF JURISDICTION .

1. The Supreme Court has jurisdiction to review the judgment in question under the provisions of Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, (U.S.C.A. Title 28, Chap. 9, Sec. 347 (a)).

2. The date of the judgment of the Circuit Court of Appeals was December 5, 1944 (R. 67); petition for rehearing timely filed December 26, 1944 (R. 88-70); considered and overruled, without additional opinion, January 11, 1945 (R. 79).

3. The questions here presented arise solely on the pleading and involve primarily the validity and enforcibility of petitioner's contract of employment with respondent, and secondly, the sufficiency of his pleading (first amended petition, R. 56-7), with Exhibits attached (R. 29-35), as assailed by the specific grounds alleged in the motion to dismiss (R. 58-9). The order of dismissal in the trial court (R. 59-60) was a general order sustaining respondent's motion, without specifying which of the grounds were sustained. The Circuit Court of Appeals, without considering or discussing the authorities presented in support of petitioner's position, wrote opinion sustaining certain of the grounds alleged in the motion to dismiss, and basing its affirmance on other grounds not asserted in the trial court.

The Circuit Court of Appeals has held not only that petitioner's amended petition was insufficient, but that his contract was so vague and indefinite as not to be enforcible. It is a plain contract, in writing, of employment for certain definite, designated work, as consulting engineer on the job, and with the rate of pay by definite percentage of the cost of construction, agreed upon between the parties, authorized on part of respondent by due resolution of its governing body, the City Council, in regular meeting, and acceptance of the employment and contract by petitioner.

III.

QUESTIONS PRESENTED

There are three principal questions involved:

1st: The error of the Circuit Court of Appeals, —inasmuch as *specific grounds* for dismissal had been presented and sustained in the trial court below,—in considering *any* grounds *outside* the scope of such specific assignments made against the pleading, such as that the contract was so vague and indefinite as not to be enforcible, and again, in its holding that the petition did not allege performance "of the conditions precedent to plaintiff's (petitioner's) right to recover" nor excuse same.

2nd: The validity and sufficiency of petitioner's contract of employment with respondent, as against the holding of the Circuit Court of Appeals that his right to compensation was contingent under the contract, and that the contract was so vague and indefinite as not to be enforcible against respondent.

3rd: The error of the Circuit Court of Appeals in holding the amended petition, with its attached exhibit, insufficient because: (a), it did not allege nor excuse performance "of the conditions precedent to plaintiff's right to recover"; (b), it did not allege performance was wrongfully prevented by the City; and (c), it did not allege "the period from September 2, 1935 until July 15, 1938 was not a reasonable time within which to perform the conditions precedent."

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Circuit Court of Appeals in this case, in denying respondent's liability on the contract, where the respondent had wrongfully abandoned and refused to perform, on the ground that petitioner's right to compensation was contingent under the contract, and that the contract was vague and indefinite, is contrary to the holdings of the same and other Circuit Courts of Appeals, in the following cases: *City of Del Rio* v. *Ulen*, 94 Fed. (2) 701 (5th Cir.); *Bay City* v. *Frazier*, 77 Fed. (2) 570 (6th Cir.).

2: The Circuit Court of Appeals rendered its decision in this case holding that it was not alleged that the period between the date of making of the contract and date of receipt of notice by petitioner of respondent's breach was not a reasonable time within which to perform the conditions precedent, and thus sustaining respondent's contention presented that the suit on its face was barred by the four-year statute of limitations. This holding is error, and contrary to the decision of the Second Circuit in *Kosolapov* v. *Mandell*, 23 Fed. (2) 593.

3: It is respectfully submitted that the Circuit Court of Appeals in the instant case has so far departed from the accepted and usual course of judicial proceedings in its consideration of matters not raised in the trial court as grounds for dismissal of the peti-

tion, and in holding the contract contingent and so vague and indefinite as not to be enforcible, as well as in holding the amended petition did not state a cause of action, that the exercise of this Court's power of supervision is called for.

WHEREFORE petitioner prays that writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, tc the end that the errors aforesaid may be corrected by this Court, and that the judgments of the trial court and the Circuit Court of Appeals may be reversed and petitioner afforded opportunity for presentation and decision of his case upon the merits.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION BELOW

The Opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 146 Fed. (2) 131, and is also found, printed in full on R. 66. It affirms the order of dismissal "upon the same grounds as stated in *McAllister* v. *City of Riesel*." The Opinion in the Riesel case referred to is reported in 146 Fed. (2) 130.

As above stated, this is a companion case to that of *McAllister* v. *City of Riesel*. The legal questions are identical. The Opinion in the instant case merely adopts the grounds in the Riesel case. Petition for writ of certiorari and supporting brief in the Riesel case has been filed same date as in the instant case. We refer to the supporting brief in the Riesel case, as the Specifications of Error are identical in that and this cause.

II.

JURISDICTION

The date of the decision of the Circuit Court of Appeals sought to be reviewed was December 5, 1944 (R. 67). Petition for rehearing was timely filed in said court on December 26, 1944 (R. 68), and was considered and overruled without additional opinion

on January 11, 1945 (R. 71). Petition for certiorari herein is presented within three months from date of the order overruling petition for rehearing in said cause.

Jurisdiction of this court is invoked under Section 240(a) of the Judicial Code (28 U.S.C.A., Sec. 347(a)).

A more detailed statement with respect to the jurisdiction of this Court is found under corresponding caption in the petition (pp. 7-8, supra), and a statement of the reasons relied on for the allowance of the writ is also set forth in the petition (pp. 10-11, supra.)

III.

STATEMENT OF THE CASE

A statement of all matters material to this controversy has been made in the petition under the caption "Summary Statement of the Matters Involved" (pp. 2-7, supra), which is here adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the order of dismissal by the trial court on grounds not set up in the motion to dismiss filed in the court below.

2. The Circuit Court of Appeals erred in holding and concluding that "any right in plaintiff to receive compensation was contingent under the contract."

3. The Circuit Court of Appeals erred in holding the contract between petitioner and respondent was so vague and indefinite as not to be enforcible.

4. The Circuit Court of Appeals erred in holding the complaint insufficient because it did not allege or excuse performance of conditions precedent to petitioner's right to recover.

5. The Circuit Court of Appeals erred in holding the complaint insufficient because it did not allege performance of the conditions precedent to petitioner's right to recover "was wrongfully prevented by the city."

6. The Circuit Court of Appeals erred in holding the complaint insufficient because it did not allege that the period between date of execution and notice of respondent's breach was not a reasonable time within which to perform the conditions precedent

V.

ARGUMENT

We frankly admit the amended complaint filed by petitioner *in propria persona* was very brief, and perhaps not all that might be desired in point of full pleading; it was, however, sufficient, we believe, to state a cause of action, particularly under the

present liberal rules of pleading, the purpose of the rules being to secure to litigants trial of their causes on the merits, without regard to forms and technicalities, which may have pertained under the old practice. The contract between the parties was sufficient; certainly the assaults leveled at it in the trial court are the only ones which should be considered on appeal.

We deem it proper to discuss the questions involved in the following order: 1. The impropriety or error of the appellate court in affirming the order of dismissal on grounds not presented in the trial court. 2. The error in holding that the contract was contingent, and that it was so vague and indefinite as not to be enforcible. 3. The error of the court in holding the complaint insufficient because it did not allege nor excuse performance "of the conditions precedent to plaintiff's right to recover," nor allege such performance was wrongfully prevented by respondent. 4. The error of the court in holding the complaint was insufficient because it did not allege the period from September 2, 1935 to July 15, 1938 "was not a reasonable time within which to perform the conditions precedent."

(1) *The Error of the Court in Affirming the Order of Dismissal on Grounds Not Set Up in the Motion to Dismiss.*

The Circuit Court of Appeals, in its opinion, stated the contract was so vague and indefinite as not to be enforcible. That contention was never presented to the trial court (R. 58-9); hence petitioner

was afforded no opportunity to amend, if necessary, nor to supplement, if necessary, the allegations with reference to the contract, to aver matters in explanation of, or matters which may have rested in parol, to render the contract definite. We respectfully submit, as we shall discuss more fully hereinafter, that the contract was a sufficient contract of employment of petitioner, as written, but certainly if indefinite in any particular, such defect could not be raised nor considered by the appellate court, for the first time on appeal, nor be advanced as basis for an affirmance.

Again the Circuit Court of Appeals went outside the specific grounds for dismissal as found in the motion (R. 58-9), in its holding that the complaint was insufficient because it did not allege performance "of the conditions precedent to plaintiff's right to recover, nor excuse same." Here again the claimed defect, if it was such, might easily have been met, if the objection had been among those urged in the trial court. These two illustrations, and the patent fact that they could have been met by supplemental fact averments, serve to illustrate the justice and propriety of the definite limitation placed by proper rules of appellate procedure on the matters which an appellate court may consider. On appeal from an order of dismissal, the appellate court is confined to the sufficiency *vel non* of the specific attacks made, and any ground outside their scope cannot properly be considered. 5 C.J.S. Appeal and Error, Sec. 1464, n. 6; Sec. 1465, n. 39; Sec. 1495, n. 47; *Seward* v. *South Florida Securities*, 96

Fed. (2) 964, syl. 15; *Holliday* v. *Tennis Coal Company*, 236 Ky. 227, 32 S.W. (2) 998, syl. 5; *Mix* v. *Yoakum* (Cal. App.), 254 Pac., 557. In other words, the appellate court is restricted to the questions of propriety or not of the lower court's rulings on the defects specifically pointed out in the motion to dismiss. The two grounds aforesaid were not among those set up in the trial court. It was not like the case of a general demurrer; but this is one in which certain specific grounds had been set up in motion to dismiss, and the trial court having sustained the motion, the propriety of its ruling in passing upon those specific questions was the only question properly considerable by the appellate court, and the appellate court could not go outside of and beyond the scope of such objections as justification for its affirmance of the trial court's judgment of dismissal.

(2) *The Contract was not Contingent.*

The Opinion of the Circuit Court of Appeals holds the contract was contingent, but it does not point out wherein nor in what respect. Certainly the contract (R. 29-35) expresses no contingency upon which right to compensation depends. It was an absolute and unconditional contract on the part of respondent employing petitioner to serve as consulting engineer and to do certain work in that respect in connection with the acquisition and construction of the water and sewer systems and ice and light plants. The agreement is definite to pay him a certain percentage of the cost of the work for his services. Likewise petitioner unconditionally accepted the contract and agreed to perform the work.

If any contingency exists upon which the contract depends it is not expressed therein. It must be *read into* or *construed into* the agreement, and surely the Courts should not read into a contract between the parties any contingency or provision or condition not therein plainly expressed by the parties.

Respondent, both in the trial court and in the Circuit Court of Appeals, relied upon and presented to the Court as authority for its contention that the contract was contingent the case of *City of Big Spring* v. *Ward*, 140 Tex. 609, 169 S.W. (2) 151. The case at bar is entirely distinguishable from that case. In the case thus cited by respondent, the pleading of the plaintiff throughout expressly alleged the contract was merely a conditional obligation, and that allegation was relied upon and emphasized by the Supreme Court of Texas as basis for the holding in that case that the contract of the city was one conditioned upon future events. Indeed, as appears from the face of plaintiff's petition in that case, among other future events upon which the contract was conditioned, was the voting of bonds by the electorate of the city, which, of course, the governing body had no right to control nor forecast.

The Fifth Circuit Court of Appeals, in *City of Del Rio* v. *Ulen*, 94 Fed. (2) 701, upheld liability on a similar contract holding that the city had wrongfully abandoned and refused to perform, but could not thus escape its liability. So, too, was the holding in *Bay City* v. *Frazier*, 77 Fed. (2) 570, where "the period of service was indefinite" and "the work went on for seven years." See also *Superior Incin-*

crator Co. v. *Tompkins* (Tex. Com. App.) 59 S.W. (2) 102, and authorities there cited. In the language of *Superior Incinerator Co.* v. *Tompkins*, supra, while the city did, as alleged, wrongfully breach its contract, yet its "abandonment * * * subjects it (the city) to liability for such damages as relator may sustain."

Again, in *Houston* v. *Glover*, 40 Tex. Civ. App. 177, 89 S.W. 425, 428 (wr. ref.) it was said:

> "The fact that the city afterwards decided not to use said plans in no way lessens its obligation to pay appellee therefor, in accordance with its contract."

(3) *The Contract was not so Vague and Indefinite as to be Unenforcible.*

Neither was the contract, we respectfully submit, vague and indefinite,—certainly not to such an extent as to render it unenforcible. But the Circuit Court of Appeals so held.

Respondent, through its city commission, entered into written contract employing petitioner as a "consulting engineer." The contract of employment is set out in full as Exhibit A (R. 29-35). The work on which he was employed is stated. His duties are specifically defined.

The contract provides what his professional duties as consulting engineer shall consist of (R. 30-1, 32, copied p. 4, supra).

The amount of his compensation is specifically stated, that is (R. 30), respondent, for petitioner's services in making valuation surveys and aiding respondent to purchase small existing utilities, should "pay Six Per Cent of the purchase cost to the City of said Privately Owned Utilities, as Engineering Fees." For his services in connection with the construction of the utilities contracted for, he was to receive "a fee of Six Per Cent (6%) of the cost of work," 50% to be paid on letting of the contracts for construction, the remaining payments to be made according to the rate of compensation (6%), as the contractors were paid for estimates for completed work (R. 31). Even the items on which such percentages are to be figured are stated as being the total costs of the systems to be constructed, with specific "definitions of the cost of the work" (R. 32), as follows:

> "The Cost of the work, as herein referred to, means the cost to the Owner, but such cost shall not include any attorney's or Engineer's Fees, or salary of inspectors, or cost of the naked land, but in case of an appraisal job, where value of land includes well, towers, buildings, etc., such land shall be considered as cost to OWNER."

Petitioner unconditionally accepted and signed the contract.

Certainly here are stated all the essentials of a contract,—the agreement on part of respondent to

employ petitioner as engineer, to do specified work, at a specified rate of pay, with the terms of pay, and the unconditional acceptance thereof by petitioner.

As pointed out (p. 15 hereinabove), the contention that the contract was so vague and indefinite as not to be enforcible was not presented to the trial court, did not in any sense come within the scope of any of the specific grounds contained in the motion to dismiss, which the trial court sustained. The Circuit Court of Appeals does not point out in what particular the contract was so vague and indefinite as not to be enforcible against respondent. The work on which he was employed was certainly stated and all of the basic essentials of a contract of employment were included within the written contract. It was not necessary that minute or detailed plans and specifications be included. The very contract itself contemplated and provided that petitioner was employed for the purpose of drawing up and furnishing the detailed plans and specifications.

Certainly the job was not an indefinite one. Neither does a contract have to state a definite limitation upon the time in which it may be completed for it to be valid and enforcible. The very nature of the work, as well as custom itself, demands that no time limit be placed thereon, but that the employment, just as here, be made to do certain specified work, and therefore that the employment is made for the duration of the job.

It has been the contention of respondent in both courts below that the contract was in violation of Section 7, Art. 11 of the Constitution of Texas, which provides as follows:

> "No debt for any purpose shall ever be incurred in any manner, by any City or County unless provision is made at the time of creating same, for levying and collecting sufficient tax to pay the interest thereon, and provide for at least 2% as a sinking fund."

The Circuit Court of Appeals, however, did not sustain that contention, and we need not consume this Court's time on that matter, but it will suffice to cite some of the numerous authorities by the appellate courts of Texas, announcing the established rule in that state that where, as here, at the time the contract was made, provisional services were to be paid for on a percentage of the construction cost, which was then unknown, and the ultimate amount which the percentage would produce, is therefore impossible of ascertainment, it is not that character of debt as contemplated by the above provision of the Constitution, and therefore a valid contract, even though provision was not made for interest and sinking fund at time of the contract. *West Audit Company* v. *Yoakum* (Tex. Com. App.—holdings approved), 35 S.W. (2) 404, syl. 1; *City of Houston* v. *Glover*, 40 Tex. Civ. App. 177, 89 S.W. 425 (wr. ref.); *McClintock & Robertson* v. *Cottle County* (Tex. Civ. App.), 127 S.W. (2) 319, syl. 3 (wr. dism.—judgment correct); *Hidalgo County Water Improvement Dist. No.* 2 v. *Feick*, (Tex. Civ. App.) 111 S.W. (2) 742 (wr. dism.).

(4) *The Complaint Was Not Insufficient Because It Did Not Allege nor Excuse Performance "of the Conditions Precedent to Plaintiff's Right to Recover."*

As we have hereinabove pointed out (pp. 15-17, supra) this holding of the Circuit Court of Appeals was beyond and outside the scope of the specific grounds presented to the trial court in the motion to dismiss, and therefore could not properly be considered for the first time on appeal, nor be made the basis of an affirmance of the lower court's ruling. However, as we shall endeavor to point out, the holding in this respect was not a tenable one. Here again the Circuit Court of Appeals speaks in vague and general terms itself. It does not give the benefit of what conditions precedent to the right to recover it is claimed were not alleged nor excused. Petitioner did allege an agreement whereby respondent agreed to pay him certain engineering fees, and that respondent "breached and attempted to repudiate said contract" and that had petitioner been permitted to continue under the terms of his contract he would have been entitled to fees in the amount alleged. His contract was not outside the power of the city to make, and was not held to be outside the city's power. It was, therefore, a binding contract. The contract certainly contained no conditions upon its face. It was an *un*conditional agreement upon respondent's part to hire and pay petitioner certain fees on a percentage basis as consulting engineer on the particular work specified, and, on petitioner's part, an agreement to do that work. There was

nothing in the pleadings, nor in the contract itself, to indicate the contract was in anywise conditioned on performance of any future act. Certainly petitioner's performance of the services called for was not a condition precedent to his right of recovery. The allegation of breach of the contract was tantamount to an averment that the breach thereof on the part of respondent was wrongful, else it would not have constituted a breach.

Another reason why it would not have been necessary for any compliance with the Texas Constitutional provision (Sec. 7, Art. 11, quoted supra) requiring levying of a tax to provide for interest and sinking fund is found in the fact that the amount owing to petitioner under the contract was, at the time of making the contract, not a definite fixed amount. It was a percentage of the construction costs which could only be made certain after the contract was let and made. The contract was for professional services to be paid for on the basis of a certain percentage of the construction cost. At the time the contract was made, what that percentage would amount to was impossible of ascertainment. The Supreme Court of Texas in *West Audit Co.* v. *Yoakum* (Tex. Com. App.—holdings approved), 35 S.W. (2) 404, syl. 1, held under such circumstances, where it would have been impossible at the time of making the contract to know or estimate the amount of the debt or how much tax to levy, or how much sinking fund to provide for, that it was not that character of debt as contemplated by the provision

of the Texas Constitution, and therefore was a valid contract even though provision was not so made at the time. The court there said:

> "It appears from the record that it would have been impossible, at the time of the making of the contract, for the commissioners' court to provide for the levying and collecting a sufficient tax to pay the interest thereon and provide a sinking fund, for the reason that they did not know, and had no way of estimating, the amount of the debt, or how much tax to levy or how much sinking fund to provide for * * *
>
> "In our judgment the contract made by Yoakum county with the West Audit Company does not violate article 11, par. 7, of the Constitution of Texas. The West Audit Company contracted with Yoakum county to audit the books of that county for a certain sum per day, and neither party could make any estimate of the number of days it would require to complete the contract and could not, therefore, arrive at the amount necessary to pay for the work to be done. In this view we think we are sustained by the following authorities: *City of Tyler* v. *Jester & Co.*, 97 Tex. 344, 78 S.W. 1058, 1062; *City of Houston* v. *Glover*, 40 Tex. Civ. App. 177, 89 S.W. 425, 427 (W. E. Ref.); *Tackett* v. *Middleton* (Tex. Com. App.) 280 S.W. 563, 44 A. L. R. 1143; *Austin Brothers* v. *Patton* (Tex. Com. App.) 288 S.W. 182."

See similar holding in *McClintock & Robertson* v. *Cottle County* (Tex. Civ. App.), 127 S.W. (2) 319, syl. 3, (wr. dism.—judgment correct). Also see *Houston* v. *Glover*, 40 Tex. Civ. App. 177, 89 S.W.

425 (wr. ref.); *Hidalgo County Water Improvement District. No. 2* v. *Feick*, (Tex. Civ. App.) 111 S.W. (2) 742 (wr. dism.).

In short, respondent had made a definite contract of employment and petitioner was not obligated, nor was it made part of his duties under the contract, to see that the funds were actually available. The city could not wrongfully breach its solemn contract and thus hide behind its own wrong and attempt to place upon petitioner the burden of showing that the funds had been made available. The Fifth Circuit Court of Appeals in *City of Del Rio* v. *Ulen*, 94 Fed. (2) 701, held:

> "Appellant points out that its contract with appellee recites that funds to finance the work were to be procured from PWA; that these funds have never been received; and that the contract provides that the city will make payments to the contractor 'only as the money is made available' by PWA. It appears, however, that the city voluntarily abandoned its financing contract with PWA because it was dissatisfied with the delay, and immediately proceeded with the construction project through a purported contract with another contractor, paying for the work with funds secured from another source. The city cannot thus escape liability to appellee. *City of Houston* v. *Potter*, 41 Tex. Civ. App. 381, 91 S.W. 389; *Superior Incinerator Co.* v. *Tompkins*, Tex. Com. App., 59 S.W. (2) 102, 103; *Fooshee* v. *Victoria*, Tex. Civ. App., 54 S.W. (2) 220."

See also *City of Houston* v. *Potter*, 41 Tex. Civ. App. 381 (wr. ref.), 91 S.W. 389, 393; *Superior Incinerator Co.* v. *Tompkins* (Tex. Com. App.) 59 S.W. (2) 102, 103.

Certainly nothing appeared in the contract, nor in the pleadings, to indicate either that the duty was imposed upon petitioner, rather than respondent, to procure or assure the funds, or that the funds had failed, or would or might fail. On the contrary, it is apparent the work and petitioner's efforts were going forward until the sudden and wrongful breach by respondent. As above stated, respondent could not hide behind its own wrongful act in repudiating and breaching the contract, and not be liable to petitioner under the definite and binding agreement it had made.

Moreover, these are all matters which should properly be raised defensively on the merits. They were not matters which petitioner was required to plead as part of his cause of action. He pleaded the contract, its execution, and its wrongful breach by respondent.

(5) *The Error of the Circuit Court of Appeals in Holding the Complaint Insufficient Because It did Not Allege Performance of the Conditions Precedent to Petitioner's Right to Recover "Was Wrongfully Prevented by the City."*

What has been said hereinabove (pp. 23-7), concerning the holding of the Circuit Court of Appeals

that the conditions precedent to petitioner's right to recover were not alleged nor excused, and the complaint or petition thereafter defective, is applicable here. Certainly under the present liberal rules of pleading, as established by the Federal Rules of Civil Procedure, the pleading could not be held defective for this reason. The very allegation that the contract was breached by respondent comprehends the fact that the breach and action on part of respondent was wrongful, and that its action was tantamount to a repudiation of the contract, and both relieved and excused any further attempt at compliance. The wrongful breach would necessarily comprehend the fact that respondent thereby wrongfully prevented compliance with the contract and performance of whatever conditions precedent, if any, there were.

(6) *The Circuit Court of Appeals Erred In Holding The Complaint Insufficient on the Ground It Did Not Allege That The Period Between Execution of The Contract and Notice To Petitioner of Respondent's Breach of It Was Not a Reasonable Time Within Which to Perform The Conditions Precedent.*

The opinion in this case affirms the dismissal on the same grounds as in the *McAllister* v. *City of Riesel.* As stated above, the Riesel opinion is found in 146 Fed. (2) 130. In that opinion, the Court held that the complaint was insufficient, because it did not allege "that the period from September 2, 1935, until July 15, 1938, was not a reasonable time within which to perform the conditions precedent"

to petitioner's right to recover. As is apparent from the record in that case, which is filed with petition for certiorari therein on the same date as this, the dates referred to are dates of execution of the last of the two contracts in that case, and date of notice to petitioner of respondent's breach of the contract. While the dates are different in the instant case, since the memorandum opinion in this case affirms the dismissal on the same grounds as in the City of Riesel case, we take it that the Court intended to hold that the period between date of the contract and notice to petitioner of its breach was not a reasonable time within which to perform the conditions precedent.

In this case, date of the contract is June 9, 1936 (R. 29). The amended petition alleges that petitioner learned of the breach of the contract by respondent "on or after the 20th day of February, 1938" (R. 57). The suit, that is, the original petition, was filed February 16, 1942. This is manifested and specifically found in the order by the District Court for the Northern District of Texas, in which the suit was originally filed, granting motion for new trial, and finding that the petition was actually lodged wth the Clerk, and should be considered as having been filed on February 16, 1942, and, further, that "the cause of action against the defendant, the City of Moody, a municipal corporation, is not barred by the four years statute of limitation" (R. 52-3).

We assume (though we confess again the language is in such general and vague terms that it is

difficult to be certain of the exact holding of the Court) that such language in the opinion was directed to Ground No. 6 of the motion to dismiss in the trial court, which was that "The suit on its face is barred by the four years statute of limitation"; otherwise we see no pertinency of the holding to any of the other grounds alleged in the motion to dismiss, filed by respondent. The ground urged in the motion to dismiss in the trial court, however, was further limited (R. 59) in that "it appears therefrom (i.e., on the face of the pleadings) that the city had breached its contract more than four years prior to the filing of this suit." Thus again we submit the specific ground pointed out in the trial court does not comprehend the reason stated by the Circuit Court of Appeals for insufficiency of the complaint in this particular. It is not among the grounds alleged in the trial court.

Moreover, we respectfully submit such question was not one properly to be anticipated and alleged by petitioner in his complaint, but was purely a defensive matter to be raised by defensive pleading on the merits by respondent. As we understand the rule in case of demurrer or motion, the fact of the bar of limitation can only be raised where it affirmatively and clearly appears on the face of the pleading, and is not a matter that can be raised by general demurrer or motion to dismiss for its failure to be alleged. *Kosolapov* v. *Mandell*, 23 Fed. (2) 593; *U. S.* v. *Kern* (D. C., E. D. N. Y.) 8 Fed. Supp. 296; 37 C. J. 1208-9, Sec. 711 (and cases there cited.)

Again, the period from June 9, 1936, to February 20, 1938, less than one year and eight months between date of contract of employment and date when it is alleged in the petition petitioner first learned of the breach, is certainly a far less period than the approximately seven year period in the case of *Bay City* v. *Frazier*, 77 Fed. (2) 570, which the Sixth Circuit Court of Appeals held to be a reasonable time.

The suit here was filed February 16, 1942 (R. 52), within less than four years from date of petitioner's knowledge of the breach first had on February 20, 1938. This being a written contract, the four years statute of limitations of Texas applied. (Revised Civil Statutes of Texas, Art. 5527, Sec. 1, see appendix p. 34). The date of breach or repudiation by respondent is not alleged in the petition. For aught that appears in the petition, therefore, the suit was brought within four years of the breach. The general rule is that the bar of the statute of limitations begins to run from time of the breach, and that ignorance of such time does not suspend or extend the time; but there are a number of well decided exceptions to such general rule. Here the contract was for personal services of plaintiff, was at the time of repudiation still executory, not having been fully executed by either party. Petitioner had performed, and was continuing to perform the services called for by the contract on his part. The wrong here on the part of respondent consisted, not in its default after maturity of the obligation, but in repudiation before such time, while the contracts were still executory by both parties, and while

petitioner was still working and relying on it. Under such circumstances, the Texas decisions, recognized in other courts as well, are to the effect that limitation runs *from time of notice* to the plaintiff of the repudiation.

Henrietta National Bank v. *Barrett*, (Tex. Civ. App.) 25 S.W. 456 (wr. ref.); *Pruitt* v. *Durant*, 84 Tex. 8, 19 S.W. 281; *Matlock* v. *G. C. & S. F.*, (Tex. Civ. App.) 70 S.W. (2) 279 (wr. dism.); *Weiss* v. *Gaines*, (Tex. Com. App.) 81 S.W. (2) 39; 28 Tex. Jur. 169, Sec. 77, n. 2; 37 C. J. 969-971, Sec. 350, and the many cases of exceptions noted; 34 Am. Jur., Lim. of Act., Sec. 230; *Sheehy Co.* v. *Eastern Imp. & Mfg. Co.*, 44 App. D. C. 107.

Indeed, respondent in the United States Circuit Court of Appeals did not urge the contention that the case was barred by limitation, but apparently abandoned such contention.

VI.

CONCLUSION

The other grounds of the motion to dismiss filed in the trial court were not sustained by the Circuit Court of Appeals,—indeed, were not relied upon in such latter court by respondent, and we assume will not be relied upon here as any ground or reason for affirmance. We will, therefore, not burden the Court further with discussion of those matters.

We respectfully submit that the amended complaint was not vulnerable to the specific grounds for dismissal urged in the trial court, and that those are the only ones which the appellate court can properly consider. We understand the rules of civil procedure as promulgated by this Court to have enlarged the liberality in form of pleading, and that one purpose thereof was to require merely sufficient allegation to apprize the opposing party of the claim asserted, and to give him notice thereof. However informal may be the petition, however unlearned he may be in the ruls of pleading, every citizen has a right to present his cause to our district courts. Certainly nothing was presented in the motion to dismiss which was sufficient to warrant the summary action of dismissal, and thus forever close the doors of the court to petitioner on his cause of action

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

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APPENDIX

From Vernon's Texas Revised Civil Statutes of 1925:

"Art. 5527.

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debts where the indebtedness is evidenced by or founded upon any contract in writing."

(31)

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NO. 1131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

HARVEY B. McALLISTER, *Petitioner*,

v.

CITY OF RIESEL, TEXAS, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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